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A

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2. *Interest — Usury.* — A party who has voluntarily paid unlawful interest upon a usurious contract cannot, by suit, recover back the unlawful interest thus paid.—Ransom v. Hays, Garn., 445.

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ADMINISTRATION.

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imputed. A devisee cannot show title to personal estate until the will has been admitted to probate, and no cause of action accrues until letters testamentary or of administration are granted.—*Id.*

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1. *Corporation—Garnishment.*—A subscriber to the stock of a corporation who has accepted the charter, and assisted in putting it in operation cannot show, as a defence to a suit by the company, that the charter was obtained by fraud.—Smith v. Heidecker, Garn., 157.
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3. *Plea in Abatement—Practice—Judgment.*—Where an attachment is brought in aid of a previous writ of summons, upon a verdict for defendant upon a plea in abatement to the attachment, the judgment should be entered dissolving the attachment, not dismissing the suit. The plaintiff has the right to prosecute his original suit after the attachment is dissolved.—Peery's Adm'x v. Platte, 404.
4. *Garnishment—Damages.*—A mere liability of the garnishee to an action on the part of the defendant for unliquidated damages, as for negligence, fraud, wrongful conversion, or for the recovery of usurious interest paid him by the debtor, cannot be the foundation of a judgment against a garnishee.—Ransom v. Hays, Garn., 445.

B

BAILMENT.

1. *Contract—Carriers—Damages.*—A party can recover damages only when they are the natural and necessary consequence of the act complained of. The act of public enemies is an excuse to a carrier for a loss of goods delivered to him, if the loss was not occasioned by his own negligence or want of proper care. The carrier is bound to transport and deliver the goods within a reasonable time and without unnecessary delay, but his failure so to do will not make him responsible for losses not occasioned by such delay.—Clark v. Pacific R.R., 184.
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BANKS AND BANKING.

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business of banking may make loans of money in this State; the object of the act relating to illegal banking was to prevent the introduction of a depreciated currency into this State, and the competition of foreign banks with our own.—Conn. Mut. Life Ins. Co. v. Albert et ux., 181.

2. *Bills and Notes—Forged Endorsement—Bankers.*—The acceptor of a forged bill is bound to know the handwriting of the drawer; and if he have accepted and paid the bill to a holder *bona fide* and for a valuable consideration, he cannot recover back the money. Where persons are equally innocent, and one is bound to know and act upon his knowledge, and the other has no means of knowledge, it would be unjust to burden the latter with a loss for the purpose of exonerating the former.—Stout v. Benoist et als., 277.

3. *Lands and Land Titles.*— Under the "Act to regulate banking institutions" (Sess. Acts 1856-7, p. 21, § 26), the banks thereby incorporated might lawfully purchase real estate, if the purchase was made in good faith for the purpose of securing a debt due to the bank.—Merchants' Bk. v. Harrison et al., 433.

See CORPORATIONS.

BILLS AND NOTES.

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2. *Officer — Notary.* —The certificate of protest made by a notary is evidenec of the presentment and demand at the time and in the manner stated in the certificate.—*Id.*

3. *Demand.*—Presentment and demand of payment must be made of the maker or drawer of a note or bill, if he can be found at his place of business or place of residence.—*Id.*

4. *Forged Endorsemeut—Bankers.*—The acceptor of a forged bill is bound to know the handwriting of the drawer; and if he have accepted and paid the bill to a holder *bona fide* and for a valuable consideration, he cannot recover back the money. Where persons are equally innocent, and one is bound to know and act upon his knowledge, and the other has no means of knowledge, it would be unjust to burden the latter with a loss for the purpose of exonerating the former.—Stout v. Benoist et als., 277.

5. *Assignments—Mortgage—Choses in Action.*—A note may be assigned by a separate and distinct paper; and where a party conveyed real estate by deed of mortgage, and also "all his notes, bonds, accounts and evidences of debt," the title to such *choses in action*, although not delivered, passed to the mortgagee as against an execution creditor.—McGee v. Riddlesbarger et als., 365.

6. *Endorsement of Note in blank—Different Sum.*—A party who takes a note signed by the makers and endorsed in blank, with blanks in the body of the

BILLS AND NOTES *(Continued)*.

note for the amount for which it was to be filled up, but with figures in the corner specifying the sum, is thereby notified that the blank may be filled up for the sum specified in the margin and no more; and is put upon inquiry as to the authority of the party offering the note to fill the blank with any different sum.—Henderson v. Bondurant et als., 369.

C

CONFLICT OF LAWS.

Domicil — Partnership. — Einer v. Beste & Deynoodt, 32 Mo. 240, affirmed. By the law of Louisiana, the assignment by one partner of the partnership property of an insolvent firm to the syndics or assignees, appointed under the laws of that State, transfers the title to the whole partnership property as against a creditor of the firm domiciled in that State.—Einer et al. v. Deynoodt, Interpleader, &c., 69.

CONSTITUTION.

1. *Corporation, Member of — Assessments.* — A corporation created for the purpose of executing some work of public utility may be invested with the power of raising the funds necessary for the work by assessments upon the property to be benefited, and it is of no consequence whether the party owning the land assessed be a member of the corporation or not. In a suit to collect the amount thus assessed, the defendant cannot set up as a defence that the work was not properly done. — Columbia Bottom Levee Co. v. Meier, 53.

2. *Corporations — Revenue.* — Hardin v. Egyptian Levee Co., 27 Mo. 495, affirmed.—*Id.*

3. *Judiciary.* — The amendment to the Constitution ratified by the General Assembly at the Session of 1850-51, was intended to produce uniformity in the tenure of the judges throughout the State. The power to create new circuits was given to the Legislature, and it had authority to provide when creating a new circuit, that the judge elected in that circuit should hold his office until the next general election for judges, although it should be for a less term than six years.—State ex rel. Jackson v. Emerson, 80.

4. *Jury — Practice.* — In trials in the Circuit Court, the parties are entitled to demand a jury of twelve men; and if the case be tried by a smaller number, except a lawful jury be waived by consent entered of record, the judgment may be arrested. (Brown v. Hann. & St. Jo. R.R., 37 Mo. 298, affirmed.)—Scott et al. v. Russell et al., 407.

5. *Municipal Corporations — Counties — Taxation.* — The act of the General Assembly of February 11, 1861, (Sess. Acts 1861-2, p. 388,) authorizing the County Court of Buchanan county to subscribe to the stock of railroads terminating at or near said county, after submitting the matter to a vote of the taxable inhabitants of said county, left to the court the discretion of subscribing or refusing to subscribe to such railroads notwithstanding a vote of the taxable inhabitants authorizing it to make such subscription. The General Assembly had authority to authorize counties and municipal corporations to subscribe to the stock of railroads in other States terminating at or near the boundaries of such counties. The provisions of said act are

CONSTITUTION *(Continued)*.

inconsistent with the provisions of the present Constitution, which provides for submitting the question of such subscriptions to the qualified voters of the counties without any qualification as to taxation.—St. Jo. & Denv. City R.R. Co. v. Buchanan Co. Ct., 485.

6. *Laws — Legislature.* — The Constitution, except when special provision is made for that purpose, does not enforce itself. It gives certain powers, but to make them operative legislation is necessary. Laws which become inoperative on account of repugnancy to, or inconsistency with, the Constitution, must be legislatively amended before they can be put in execution.—*Id.*

CONTRACTS.

1. *Landlord and Tenant — Rents — Lease.*—Where a tenant for a term of years, or from year to year, holds over and retains possession of the premises after the end of his term and without any new agreement, he will be held to continue under the terms and conditions of the original lease; but where an agreement, express or implied, is made for an increased rent, the larger rent will be payable although the tenant's liability is continued on the terms of the previous lease. Where a tenant is notified by the landlord that if he retain the premises after the end of his term he must pay an increased rent, if the tenant do not express his dissent within a reasonable time he will be held as assenting to the proposed change. In such case it is the duty of the tenant to express his dissent, that the landlord may take the proper steps to recover his possession. By remaining in possession and continuing silent, his assent will be presumed.—Hunt v. Bailey, 257.

2. *Sale — Statute of Frauds — Delivery.*—At common law, where a proposition to sell goods is accepted by the buyer, and the goods are in the possession of the seller, and they are separate from other goods, and require nothing further to identify them and prepare them for delivery, the sale is complete and the title to the goods passes to the purchaser; but by the provisions of the statute of frauds the contract must be shown by a memorandum in writing signed by the party to be charged, or there must be a delivery and acceptance of part of the goods. B. sold to W. 223 bales of hay lying by themselves on the levee at St. Louis, at the price of $33 per ton, and gave to W. a ticket describing the number of bales and the price at which the hay was sold, the ticket authorizing the purchaser to take the hay as soon as it could be weighed; — W. requested that the hay should not be weighed on that day, to which B. assented on condition that the hay should be at W.'s risk; *held*, that the jury was warranted in finding that the hay had been delivered, and that W. was responsible for the price although the hay was burned upon the levee before weighing.—Bass et als. v. Walsh, 192.

3. *Sale — Delivery — Bailee.*—Where the seller has performed all that was required of him by the terms of the contract, and delivery alone remains to be made, the property vests in the buyer so as to subject him to the risk of accident which may befall the subject of the sale. Where goods are in possession of a bailee of the vendee, a bill of sale by the vendor gives an immediate and valid title to the purchaser. What amounts to a delivery of

CONTRACTS (*Continued*).

goods sold, is, when the facts are given, a question of law for the court.—Williams v. Evans' adm'r, 201.

4. *Sale—Delivery.*—The plaintiff sold to defendant twenty-six head of cattle, at a stock-yard, for a price agreed; defendant paid part of the purchase money, and was to pay the balance the next day to the keeper of the stock-yard, who was by agreement of parties to deliver the cattle upon payment of the balance; part of the cattle escaped before payment;—*held*, that the purchaser was liable for the payment of the balance of the purchase money. (See *ante* Williams v. Evans' Adm'r, 201.)—Sigerson v. Kahmann, 206.

5. *Sale—Measure of Damages.*—Where a vendor agrees to sell and deliver personal property at or within a particular time, and fails to perform his contract, the measure of damages is the difference between the contract price and the market value at the time it should have been delivered. Where the vendee refuses to accept, the measure of damages is the difference between the market value at the time of delivery and the enhanced price which he contracted to pay.—Northrup v. Cook et al., 206.

6. *Sale — Delivery — Statute of Frauds.* — Under the statute of frauds, no sale of goods is valid unless the buyer accept and actually receive part of the goods, or the contract be witnessed by writing. The goods must not only be accepted but actually received; there must be a delivery of possession by the vendor to the vendee.—Harvey v. St. Louis Butchers', &c., Ass'n, 211.

7. *Sale—Action.*—Defendant sold tobacco to plaintiff, to be paid for in cash on delivery. Plaintiff not having the money, the time of payment was by agreement extended for ten days. The money not being paid within that time, defendant resold the tobacco. *Held*, that the plaintiff had no cause of action.—Steinberg v. Kintzing, 220.

8. *Sale — Statute of Frauds.* — A sale of personal property is valid under the statute of frauds without an actual delivery, if any part of the price be paid and accepted as earnest money to bind the bargain. — Woodburn et al. v. Cogdal et al., 222.

9. *Parol Evidence — Sale.* — The printed conditions under which a sale by auction proceeds cannot be varied or contradicted by parol evidence of the verbal statements of the auctioneer made at the time of sale, except for the purpose of showing fraud; but parol evidence not inconsistent with the terms of sale and explanatory of them is admissible. The wrecks of steamboats, lying in the Mississippi river, were sold by name as lying at certain localities; the names of the boats as applied to the localities were reversed. *Held*, that evidence was admissible to show that the materials were lying in the river at the localities named, and that the names were wrongly given. —Chouteau et als. v. Goddin et al., 229.

CONVEYANCES.

1. *Execution—Sheriff's Deed—Evidence—Ejectment.*—Under the statute R. C. 1855, p. 748, § 56, the recitals in the deed of the sheriff conveying the land of the defendant in the execution are presumptive evidence of the existence of the judgment and execution and the other facts recited in the deed, and

CONVEYANCES (*Continued*).

in an action of ejectment the plaintiff need not produce the judgment and execution. Holmes, J., *dissenting*.—McCormick v. Fitzmorris et als., 24.

2. *Alteration*.—An alteration apparent on the face of a deed is in law presumed to have been made prior to, or contemporaneously with, the execution of the instrument, unless peculiar circumstances of suspicion are patent.—*Id.*

3. *Recording—New Madrid Locations*.—The derivation of title from the original grantee down to the passage of the act of Congress of February 13, 1815, and the rights of persons claiming by recorded or unrecorded deeds from the same grantor, will be determined by the registry laws in force at the time, when ascertaining the ownership of the injured lands at the date of the act.—McCamant v. Patterson et al., 100.

4. *Recording—Subsequent Purchasers—Title*.—By the act of 1804 (Territorial Laws, p. 46, § 8) unrecorded deeds were valid as against the grantor, his heirs or devisees. By the act of 1825 (R. C. 1825, p. 221, § 14) the recording of a deed imparted notice to all subsequent purchasers and mortgagees, but an unrecorded deed was void except between the parties thereto and those having actual notice thereof. The recording acts relate only to purchasers and mortgagees for value, claiming title under the same grantor. A deed conveys the title and estate of the grantor, and he has no longer any title or interest in the land to descend to his heirs. The deed of the grantor, although not recorded, is good and valid against himself, his heirs, and all persons claiming in privity under them; the heirs have no interest or estate to convey.—*Id.*

5. *Recording—Judgment—Evidence*.—A decree establishing the execution of a deed which had been lost, does not operate as a conveyance, but establishes the fact that a deed was executed; and is binding upon all parties and upon all privies in estate, blood or law, although not recorded.—*Id.*

6. *Lost Deed—Equity—Cloud on Title*.—Where a conveyance of land executed and delivered but not recorded has been lost, a court of equity will protect the rights of the grantee by enjoining any sale by the heirs or representatives of the grantor, and by divesting them of any claim and establishing the title of the grantee and his heirs.—Wright's heirs v. Christy's heirs, 125.

7. *Recording—Attachments*.—A deed for land executed and delivered before but recorded after the levy of an attachment, and before the sheriff's sale under the judgment, takes precedence of the sheriff's deed. The deed is valid as between the parties thereto without recording. The attaching creditor is not a purchaser under the statute, and the deed being recorded at the date of the sheriff's sale, the purchaser buys with notice.—Stillwell v. McDonald et als., 282.

8. *Acknowledgment—Officer*.—A notary public, in his certificate of the acknowledgment of a deed conveying land in Livingston county, described himself as a notary public within and for the county of L., but appended to his signature—"Notary Public, Howard county." *Held*, that the deed was admissible in evidence.—Merchants' Bk. v. Harrison et al., 433.

9. *Sheriff's Deed—Description—Evidence*.—Parol evidence is admissible to show that the land described in a sheriff's deed is well known by the de-

CONVEYANCES *(Continued)*.

scription given, however vague that description may be.—Webster et als. v. Blount et als., 500.

10. *Deed — Estate — Granting Words — Estoppel — Covenants — Warranty.* — The words "*bargain, sell, release, quit claim and convey*" are words of release and quit-claim merely; they carry the grantor's interest and estate in the land, but do not purport to do anything more. The statutory covenants created by the words "grant, bargain and sell" do not operate as the ancient common-law warranty to transmit a subsequently acquired title. A deed purporting to convey a fee simple absolute, so as to pass a subsequently acquired title under the statute, must undertake to convey an indefeasible title; and must undertake to convey not the grantor's interest in the land, but the land itself, and in such a manner that the grantee is not to be disturbed by any one. A deed conveying the "*right, title and interest*" of the grantor can have no other or greater effect than a deed of release and quit-claim.—Gibson v. Chouteau's heirs, 536.

11. *Lands and Land Titles—Patent—Relation—Limitations.*—Where the equitable title has passed from the United States, the legal title evidenced by a patent will relate back to the emanation of the equitable title, so that the limitation created by an adverse possession under the statutes of the State will commence to run from the emanation of the equitable title. When the survey of a New Madrid location is returned to the Recorder of land titles, an exchange of lands is effected between the Government and the locator, and the equitable title passes from the United States, and from that date a party in possession of the located land may prescribe as against the New Madrid locator.—*Id.*

12. *Recording—Notice—Title.*—The statute of October 1, 1804 (1 Ter. Laws, 46, § 8), did not avoid unrecorded deeds as between the parties thereto, but only as to subsequent purchasers and mortgagees for a valuable consideration; as between the parties and their heirs the deed operated as a conveyance to pass the title.—*Id.*

CORPORATIONS.

1. *Revenue—Constitution.*—Hardin v. Egyptian Levee Co., 27 Mo. 495, affirmed.—Columbia Bottom Levee Co. v. Meier, 53.

2. *Powers.* — Whenever it is shown that a corporation is duly organized in accordance with the statute giving it an existence, the company becomes duly authorized to carry out the purposes of its creation.—*Id.*

3. *Constitution — Assessments.*—A corporation created for the purpose of executing some work of public utility may be invested with the power of raising the funds necessary for the work by assessments upon the property to be benefited, and it is of no consequence whether the party owning the land assessed be a member of the corporation or not. In a suit to collect the amount thus assessed, the defendant cannot set up as a defence that the work was not properly done.—*Id.*

4. *Elections.*—A majority of the corporators actually voting at an election for directors is sufficient to elect.—*Id.*

5. *Railroad—Evidence—Witness.*—By the law of this State, a passenger upon

CORPORATIONS *(Continued)*.

a railroad whose baggage has been lost, may be a witness to prove the contents and value of the baggage lost—R. C. 1855, p. 435, sec. 45.—Nolan v. Ohio & Miss. R.R. Co., 114.

6. *Attachment — Garnishment.* — A subscriber to the stock of a corporation who has accepted the charter, and assisted in putting it in operation, cannot show, as a defence to a suit by the company, that the charter was obtained by fraud.—Smith v. Heidecker, Garn., 157.

7. *Illegal Banking.* — A foreign corporation not engaged in the business of banking may make loans of money in this State; the object of the act relating to illegal banking was to prevent the introduction of a depreciated currency into this State, and the competition of foreign banks with our own. —Conn. Mut. Life Ins. Co. v. Albert et ux., 181.

8. *Landlord and Tenant — Lease — Forfeiture — Municipal Corporation.*—The courts cannot relieve against a forfeiture of a lease declared by a municipal legislative body; but to give validity to such a forfeiture the action of the council must conform to all the requirements of the charter—Graham v. City of Carondelet, 33 Mo. 262, affirmed. Before the forfeiture is completed by the approval by the mayor of the resolution of the council, the lessee may tender the rent due and thus avert the penalty.—City of Carondelet v. Wolfert, 305.

9. *Lands and Land Titles—Railroad Corporations.*—Under the act of Congress of June 10, 1852, granting lands to the State of Missouri for the construction of the roads therein named, and the statute of the State, of December 25, 1852, transferring such grants to the companies therein named, no title to the even numbered sections passed to the corporations until the plats of location of the road were filed in the office of the Secretary of State, and in the offices of the recorder of deeds of the counties in which the lands were situated.—Pacific R.R. v. Lindell's heirs, 329.

10. *Lands and Land Titles—Railroad Corporations—Estoppel.*—Under the act of Congress of June 10, 1852, granting lands to the State of Missouri, and the act of the State of December 25, 1852, transferring such grant to the Pacific Railroad, the agent of the company, in estimating the quantity of lands within the exceptions of the granting act, returned sections 8 and 18, T. 45 N., R. 7 E., as included within the exceptions, and selected lands outside of the limit of six miles to make up the quantity of lands to which the company was entitled under the grants, lists of which were certified to the company. *Held*, that by this action the company was estopped from asserting that said sections were not included within the exceptions of the act, although subsequent corrections of the certified lists made at the General Land Office showed that the company had not received all the lands to which it was entitled.—*Id.*

11. *User—Evidence.*—The charter of a corporation, with proof of the exercise of the powers thereby conferred, is *prima facie* evidence of the legal existence of such corporation.—Merchants' Bk. v. Harrison et al., 433.

12. *Railroad, Authority of.* — A corporation chartered with power to build a railroad from one point to another, and to transport passengers and freight, has no authority to run a line of steamboats in connection with the road, and

CORPORATIONS *(Continued)*.

all contracts beyond the authority given in the charter are void.—Hoagland v. Hann. & St. Jo. R.R. Co., 451.

13. *Railroad—Authority.*—The officers and agents of a railroad company have no authority to use the funds of the corporation in running a line of steamers in connection with the road, and all contracts for that purpose are illegal—Hoagland v. Han. & St. Jo. R.R., *ante* p. 451.—City of St. Joseph ex rel. &c. v. Saville, 460.

14. *Revenue—Muntcipal Corporations.*—The City of St. Joseph by its charter (Sess. Acts 1863-4, p. 430) had authority to levy and collect taxes for municipal purposes upon all property, real and personal, within the city limits. Steamboats, whose home port and *situs* was that city where the nominal owners resided, are subject to taxation.—*Id.*

15. *Revenue—Municipal Corporations—Railroad Corporations.*—The City of St. Joseph, by its charter (Sess. Acts, 1863-4, p. 431), had authority to levy and collect a tax upon the real property of the Hannibal and St. Joseph Railroad Company situate within the chartered limits of said city. The exemption from State and county taxation upon the stock of said company by its charter did not prevent the Legislature from repealing the exemption, or subjecting the corporation to further taxation. The subjecting the property of said company to taxation for municipal purposes was not a double taxation.—City of St. Joseph v. Hann. & St. Jo. R.R. Co., 476.

16. *Municipal Corporations— Counties —Taxatton.*—The act of the General Assembly of February 11, 1861, (Sess. Acts 1861-2, p. 388,) authorizing the County Court of Buchanan county to subscribe to the stock of railroads terminating at or near said county, after submitting the matter to a vote of the taxable inhabitants of said county, left to the court the discretion of subscribing or refusing to subscribe to such railroads notwithstanding a vote of the taxable inhabitants authorizing it to make such subscription. The General Assembly had authority to authorize counties and municipal corporations to subscribe to the stock of railroads in other States terminating at or near the boundaries of such counties. The provisions of said act are inconsistent with the provisions of the present Constitution, which provides for submitting the question of such subscriptions to the qualified voters of the counties without any qualification as to taxation.—St. Jo. & Denv. City R.R. Co. v. Buchanan Co. Ct., 485.

COURTS.

See CONSTITUTION, 3. JURISDICTION.

Jurtsdiction — Contempt — Divorce. — Imprisonment for debt being abolished, a party cannot be imprisoned for a contempt of court in refusing to obey an order or decree directing the mere payment of money. An order for the payment of alimony is simply an order for the payment of money.—Coughlin v. Ehlert, 285.

D

DAMAGES.

1. *Execution—Levy—Claim—Bond.*—An execution issued upon a judgment in favor of A. against B. The sheriff levied the execution, and M. filed with

DAMAGES (*Continued*).

the sheriff a claim to the property seized, and the sheriff demanded and received from A. a bond of indemnity. A subsequent execution issued in favor of D., upon which the sheriff endorsed a levy, and required of D. a bond of indemnity before paying to D. the surplus realized upon the sale by virtue of the execution in favor of A., which was given. In a suit upon the bond given by A., D. recovered the value of the goods seized to satisfy the execution of A. In a suit upon the bond given by D., *Held*, 1. That, the sheriff having in his possession the goods levied upon under A.'s execution, no further levy was required upon the execution of D. 2. That the claim filed by M. under the levy upon the execution of A., authorized the sheriff to demand a bond of indemnity from D. 3. That M. was entitled to receive satisfaction for the value of the goods sold which were applied upon D.'s execution. 4. That the taking of the bond from D. discharged the sheriff from his liability for his levy. 5. That M. was entitled to full satisfaction for the goods sold to satisfy the executions. —State to use, &c., v. Doan et als., 44.

2. *Contract — Sale.* — Where a vendor agrees to sell and deliver personal property at or within a particular time, and fails to perform his contract, the measure of damages is the difference between the contract price and the market value at the time it should have been delivered. Where the vendee refuses to accept, the measure of damages is the difference between the market value at the time of delivery and the enhanced price which he contracted to pay.—Northrup v. Cook et al., 206.

3. *Action for Personal Property.* — In an action for the delivery of personal property, if the verdict be for defendant the measure of damages will be the value of the property at the time of the seizure, with interest thereon up to the time of trial.—Woodburn et al. v. Cogdal et al., 222.

4. *Injunction—Dissolution* —The statute (R. C. 1855, p. 1249, § 13) limits the amount of damages at ten per cent. upon the amount enjoined to cases in which money has been actually stayed by the injunction; in other cases, the defendants may recover the damages actually sustained.—Hale et al. v. Meegan et al., 272.

5. *Railroad—Negligence—Practice—Instructions.*—In an action against a carrier for injuries to a passenger caused by the negligence of the carrier, the court should not give instructions upon the subject of plaintiff's contributory negligence unless warranted by the evidence. Where the evidence showed that the passenger was injured while sitting in his seat in a railroad car and resting his head on his arm, which rested on the window-sill of the car, by the car coming in contact with the corner of a wrecked car which had not been sufficiently removed from the track; *held*, that there was no proper case made by the evidence for instructions upon the subject of contributory negligence.—Winters v. Hann. & St. Jo. R.R. Co., 468.

6. *Railroad—Negligence—Evidence.*—In an action for damages to the person of plaintiff caused by the negligence of defendant, the plaintiff may show his condition and situation in life and that of his family to enable the jury to estimate the amount of damages.—*Id.*

DEPOSITIONS.

Practice—Evidence—Copy of Deed.—Depositions presenting only hearsay testimony may be suppressed by the court before the trial. Before the copy of a deed can be admitted in evidence, the execution and existence of the original and its loss must first be shown.—Attwell v. Lynch, 519.

DIVORCE.

1. *Courts—Jurisdiction—Contempt.*—Imprisonment for debt being abolished, a party cannot be imprisoned for a contempt of court in refusing to obey an order or decree directing the mere payment of money. An order for the payment of alimony is simply an order for the payment of money.—Coughlin v. Ehlert, 285.

2. *Desertion—Practice—Pleading—Evidence.*—The plaintiff, in a suit for divorce, must allege and prove good conduct upon her own part. This averment is in its nature a negative one, and the defendant taking issue upon it may in his answer present such facts as to show that he had "good cause" for his conduct. In a suit for divorce brought by the wife against the husband, on the ground of desertion, and a cross-bill filed charging adultery of the plaintiff, evidence of the general reputation of the wife for chastity is not admissible.—Yallaly v. Yallaly, 490.

DOMICIL.

See CONFLICT OF LAWS.

DRAM-SHOPS.

See CRIMINAL PRACTICE.

1. *Criminal Practice—Indictment.*—In an indictment for selling spirituous and alcoholic liquors without taking the oath and giving bond as required by the statute (Sess. Acts 1860–1, p. 93), it is not necessary that the indictment should state to whom the liquor was sold, the price, or the particular kind of liquor sold.—State v. Rogers, 431.

2. *Licence—County Court.*—Although a party applying for a dram-shop licence may show himself to possess all the qualifications requisite for the issuing of a licence under the statute (G. S. 1865, ch. 98), the County Court may still, in the exercise of its discretion, refuse to grant such licence.—State ex rel. Kyger v. Holt Co. Ct., 521.

3. *Criminal Practice—Evidence—Instructions.*—Where the evidence offered is not sufficient to sustain the indictment, it is the duty of the court so to instruct the jury.—State v. Brosius et al., 534.

4. *Criminal Practice—Evidence.*—Under an indictment for selling liquors without having a dram-shop licence, it must be proved that the liquors were sold in less quantities than one gallon and for the purpose of being drunk on the premises.—*Id.*

E

EJECTMENT.

. *Outstanding Title—Mortgage.*—A defendant in ejectment, in possession of land under a deed of trust or mortgage which has become forfeited by the

EJECTMENT *(Continued)*.

default of the debtor, may protect his possession by virtue of his outstanding title under the deed of trust or mortgage.—McCormick v. Fitzmorris et als., 24.

2. *Practice—Remittitur—Supreme Court.*—When the verdict and judgment in ejectment includes lands to which the plaintiff is not entitled, he may enter a *remittitur* in the Supreme Court, and have the proper judgment entered where no inquiry into extrinsic facts is necessary.—Fine et als. v. St. Louis Pub. Schools et als., 59.

3. *Common Source of Title—Evidence.*—When both parties claim under the same third person, it is *prima facie* sufficient to show a derivative title from him without proving his title.—Merchants' Bk. v. Harrison et al., 433.

4. *Administration.*—A leasehold for ten years is a chattel interest, and passes to the administrator and not to the heirs of the lessee.—Gutzweiler's adm'r v. Lackmann et als., 91.

5. *Practice — Parties — Injunction.* — Tenants in common may join as parties plaintiff to enjoin the enforcement of a judgment in ejectment until compensation be made for improvements under the statute, although they were not all made defendants in the ejectment, the possession of one tenant in common being the possession of all.—Russell et als. v. DeFrance, 506.

6. *Improvements—Injunction—Practice—Judgment.*—In an action for an injunction to restrain the plaintiff in ejectment from enforcing his judgment until compensation be made for improvements, the court cannot enter judgment against the plaintiff in ejectment for the value of the improvements and enforce the same by execution.—*Id.*

See CONVEYANCES. EXECUTIONS. JUDGMENT. LANDS AND LAND TITLES.

ELECTIONS.

Corporations.—A majority of the corporators actually voting at an election for directors is sufficient to elect.—Columbia Bottom Levee v. Meier, 53.

See CONSTITUTION, 5.

EQUITY.

See MORTGAGES.

1. *Conveyances—Lost Deed—Cloud on Title.*—Where a conveyance of land executed and delivered but not recorded has been lost, a court of equity will protect the rights of the grantee by enjoining any sale by the heirs or representatives of the grantor, and by divesting them of any claim and establishing the title of the grantee and his heirs.—Wright's heirs v. Christy's heirs, 125.

2. *Practice — Parties — Distributees — Trustee.*—In a suit in equity brought by one distributee of the estate of an intestate against the administrator to set aside a settlement on the ground of fraud, all the distributees must be made parties either as plaintiffs or defendants, to avoid multiplicity of suits and to enable the court to make a complete and binding decree. Although a trustee of an express trust may, by the statute, sue without joining the beneficiaries with him, *quære*, can he be sued alone?—Dillon's Adm'r v. Bates, Trustee, &c., 292.

EQUITY *(Continued.)*

3. *Administration—Judgment—Appeal.*—The action of the County Court in setting aside an order of sale of the real estate of the decedent, is a final decision from which an appeal lies by the administrator to the Circuit Court.—McGee et als. v. Thompson's adm'r, 514.

4. *Lands and Land Titles — Land Office — Jurisdiction — Courts.*—Where the officers of the Land Department of the United States act in violation of or without authority of law, their action is subject to the revision of the courts; but where they act in a judicial capacity, or exercise a discretionary authority, their acts cannot be reviewed.—Garton v. Cannada et al., 357.

5. *Sales at Auction — Fraud — Suit — Evidence.*—Where a fraudulent combination and secret arrangement is made among bidders and parties to obtain at a reduced price the land of a party sold under a mortgage or deed of trust, a court of equity will set aside the sale and order a re-sale upon the application of parties entitled to the relief. A creditor who has attached the interest of the debtor prior to the sale, and subsequently purchased the debtor's equity of redemption under the judgment, may bring suit to set aside the sale, on the ground of fraudulent combination to suppress bidding and prevent competition. Such fraud may be proved by parol evidence.—Miltenberger v. Morrison et als., 71.

6. *Statute of Frauds—Agreement—Lands.*—A parol agreement between A. and B., that A. shall purchase the land of B. at a sale under an encumbrance, and allow B. the subsequent privilege of redeeming or buying the land, is an agreement within the statute of frauds, and will not be enforced in a court of equity.—*Id.*

ESTOPPEL.

1. *Lands and Land Titles — Railroad Corporations.*—Under the act of Congress of June 10, 1852, granting lands to the State of Missouri, and the act of the State of December 25, 1852, transferring such grant to the Pacific Railroad, the agent of the company, in estimating the quantity of lands within the exceptions of the granting act, returned sections 8 and 18, T. 45 N., R. 7 E., as included within the exceptions, and selected lands outside of the limit of six miles to make up the quantity of lands to which the company was entitled under the grants, lists of which were certified to the company. *Held*, that by this action the company was estopped from asserting that said sections were not included within the exceptions of the act, although subsequent corrections of the certified lists made at the General Land Office showed that the company had not received all the lands to which it was entitled.—Pacific R.R. v. Lindell's heirs, 329.

2. *Judgment—Motion.*—The action of the court refusing to set aside an order previously made upon motion of a party alleging that he had not appeared to, nor had notice of the motion upon which the order was made, concludes the party.—Bennett's adm'r v. Russell's adm'x, 152.

3. *Evidence.*—Where a party by his acts or words induces another to believe in the existence of a certain state of things, and to act upon that belief so as to alter his previous condition, he will be estopped from averring to the contrary against the party so altering his condition. The action of a part-

ESTOPPEL (*Continued*).

ner or part owner, acting as agent for all the owners, will conclude the other partners or part owners.—Chouteau et als. v. Goddin et al., 229.

4. *Contract.*—An agreement not to sue for a certain period after the maturity of a note is no bar to an action upon the note (Bridge v. Tierman, 36 Mo. 439.)—Benson's adm'rs v. Harrison, 303.

5. *Deed — Estate — Granting Words — Covenants — Warranty — Quit-cloim.* — The words "*bargain, sell, release, quit claim and convey*" are words of release and quit-claim merely; they carry the grantor's interest and estate in the land, but do not purport to do anything more. The statutory covenants created by the words "grant, bargain and sell" do not operate as the ancient common-law warranty to transmit a subsequently acquired title. A deed purporting to convey a fee simple absolute, so as to pass a subsequently acquired title under the statute, must undertake to convey an indefeasible title; and must undertake to convey not the grantor's interest in the land, but the land itself, and in such a manner that the grantee is not to be disturbed by any one. A deed conveying the "*right, title and interest*" of the grantor can have no other or greater effect than a deed of release and quit-claim.—Gibson v. Chouteau's heirs, 536.

EVIDENCE.

1. *Conveyance—Execution—Sheriff's Deed—Ejectment.*—Under the statute R. C. 1855, p. 748, § 56, the recitals in the deed of the sheriff conveying the land of the defendant in the execution are presumptive evidence of the existence of the judgment and execution and the other facts recited in the deed, and in an action of ejectment the plaintiff need not produce the judgment and execution. Holmes, J., *dissenting.*—McCormick v. Fitzmorris et als., 24.

2. *Conveyances—Recording—Judgment.*—A decree establishing the execution of a deed which had been lost, does not operate as a conveyance, but establishes the fact that a deed was executed; and is binding upon all parties and upon all privies in estate, blood or law, although not recorded.—McCamant v. Patterson et al., 100.

3. *Conveyance — Sheriff's Deed — Description.*—Parol evidence is admissible to show that the land described in a sheriff's deed is well known by the description given, however vague that description may be.—Webster et als. v. Blount et als., 500.

4. *Estoppel in pais.*—Where a party by his acts or words induces another to believe in the existence of a certain state of things, and to act upon that belief so as to alter his previous condition, he will be estopped from averring to the contrary against the party so altering his condition. The action of a partner or part owner, acting as agent for all the owners, will conclude the other partners or part owners.—Chouteau et als. v. Goddin et al., 229.

5. *Fraudulent Conveyance.*—Testimony to prove the bad faith of the parties in a sale of goods, wholly disconnected with a subsequent sale of realty, is not admissible to prove bad faith in the sale of the realty.—Gutzweiler's adm'r v. Lackmann et als., 91.

6. *Admissions — Title.* — Admissions made by the grantor in a deed after the sale are not admissible in evidence to affect the title of the grantee unless

EVIDENCE (*Continued*).

he assented to them, or they were made in his presence without objection. —*Id.*

7. *Fraudulent Conveyance.*—Where a deed is regular upon its face, it is incumbent upon the party attacking the deed to prove affirmatively that it was fraudulent, and the burden of proof is upon him.—*Id.*

8. *Practice—Instructions.*—Where evidence has been improperly admitted, it is the duty of the court to correct the error by instruction.—*Id.*

9. *Corporations, Railroad—Witness.*—By the law of this State, a passenger upon a railroad whose baggage has been lost, may be a witness to prove the contents of the baggage lost—R. C. 1855, p. 435, § 45.—Nolan v. Ohio & Miss. R.R. Co., 114.

10. *Corporations—User.*—The charter of corporation, with proof of the exercise of the power thereby conferred, is *prima facie* evidence of the legal existence of such corporation.—Merchants' Bank v. Harrison et al., 433.

11. *Action—Malicious Prosecution.*—In an action for malicious prosecution, the jury are authorized to infer the existence of malice from the want of proof of probable cause for the prosecution.—Callahan v. Cafferatta, 136.

12. *Hearsay.*—The statements of a third party who is a competent witness are not admissible in evidence.—Bain v. Clark, 252.

13. *Officer—Notary—Bills and Notes.*—The certificate of protest made by a notary is evidence of the presentment and demand at the time and in the manner stated in the certificate.—Jarvis v. Garnett et als., 268.

14. *Practice—Depositions.*—Depositions presenting only hearsay testimony may be suppressed by the court before the trial. Before a copy of a deed can be admitted in evidence, the execution and existence of the original and its loss must first be shown.—Attwell v. Lynch, 519.

15. *Divorce—Practice—Pleading*—The plaintiff, in a suit for divorce, must allege and prove good conduct upon her own part. This averment is in its nature a negative one, and the defendant taking issue upon it may in his answer present such facts as to show that he had "good cause" for his conduct. In a suit for divorce brought by the wife against the husband, on the ground of desertion, and a cross-bill filed charging adultery of the plaintiff, evidence of the general reputation of the wife for chastity is not admissible.—Yallaly v. Yallaly, 490.

16. *Damages—Negligence.*—In an action for damages to the person of plaintiff caused by the negligence of defendant, the plaintiff may show his condition and situation in life and that of his family to enable the jury to estimate the amount of damages.—Winters v. Hann. & St. Jo. R.R. Co., 468.

17. *Criminal Practice—Trial—Confession.*—When an individual is put upon his trial for a criminal offence, the particular act which constitutes the crime must be proved. The confessions of a party not made in open court, nor before a magistrate on examination, and uncorroborated by circumstances or other proof that a crime has been committed, will not warrant a conviction. State v. Scott, 424.

18. *Jury—Misconduct.*—One of the jurors cannot be a witness to prove misconduct of the jury in making their verdict.—State v. Coupenhaver, 430.

EVIDENCE *(Continued)*.

19. *Carrier—Witness—Parties.*—In an action by a passenger against a carrier for the loss of a trunk and its contents, where proof of the delivery of the trunk to the carrier is made by independent evidence, the plaintiff is a competent witness to prove the contents of the trunk. The statute, R. C. 1855, p. 1576, was not intended to restrict the competency of witnesses.—Williams v. Frost et al., 516.

20. *Statements of Parties.*—A witness who testifies as to the subject matter of conversation between parties, if he cannot state the precise words used, may be allowed to state the substance of what was said. Such testimony may go to the jury for what it is worth.—Buchanan v. Atchison, 503.

21. *Construction of Statutes.*—In construing statutes, the word "may" will be considered as mandatory only for the purpose of sustaining or enforcing, but not for creating a right.—State ex rel. Kyger v. Holt Co. Ct., 521.

EXECUTIONS.

1. *Conveyance—Sheriff's Deed—Evidence.*—Under the statute R. C. 1855, p. 748, § 56, the recitals in the deed of the sheriff conveying the land of the defendant in the execution are presumptive evidence of the existence of the judgment and execution and the other facts recited in the deed, and in an action of ejectment the plaintiff need not produce the judgment and execution. Holmes, J., *dissenting.*—McCormick v. Fitzmorris et als., 24.

2. *Conveyance—Sheriff's Deed—Description—Evidence.*—Parol evidence is admissible to show that the land described in a sheriff's deed is well known by the description given, however vague that description may be.—Webster et als. v. Blount et als., 500.

3. *Levy—Claim—Bond.*—An execution issued upon a judgment in favor of A. against B. The sheriff levied the execution, and M. filed with the sheriff a claim to the property seized, and the sheriff demanded and received from A. a bond of indemnity. A subsequent execution issued in favor of D., upon which the sheriff endorsed a levy, and required of D. a bond of indemnity before paying to D. the surplus realized upon the sale by virtue of the execution in favor of A., which was given. In a suit upon the bond given by A., D. recovered the value of the goods seized to satisfy the execution of A. In a suit upon the bond given by D., *held*, 1. That, the sheriff having in his possession the goods levied upon under A.'s execution, no further levy was required upon the execution of D. 2. That the claim filed by M. under the levy upon the execution of A., authorized the sheriff to demand a bond of indemnity from D. 3. That M. was entitled to receive satisfaction for the value of the goods sold which was applied upon D.'s execution. 4. That the taking of the bond from D. discharged the sheriff from his liability for his levy. 5. That M. was entitled to full satisfaction for the goods sold to satisfy the execution.—State to use, &c. v. Doan et als., 44.

4. *Sheriff—Coroner.*—When a writ of *fieri facias* is issued to the coroner for the reason that at the time there is no sheriff, when a sheriff is subsequently appointed and qualified, the coroner may turn over to him all unexecuted writs to be executed, and his levy and sale under the execution will be good.—Carr v. Youse, 346.

EXECUTIONS (*Continued*).

5. *Justices' Courts — Hannibal Common Pleas — Lien.* — By the provisions of the act of 3d March, 1851 (Sess. Acts 1850-51, p. 208, sec. 3), it was necessary, before an execution could issue from the office of the clerk of the Hannibal Court of Common Pleas upon the transcript of a justice's judgment, that a transcript of the judgment should also be filed in the office of the clerk of the Circuit Court of Marion county; and the filing of such transcript was a condition precedent to the judgment becoming a lien upon real estate, and authorizing an execution from said Common Pleas.—*Id.*

6. *Justices' Courts — Transcript of Judgment — Evidence.* — The certificate of a justice of the peace, that an execution has been issued upon a judgment rendered by him and has been returned *nulla bona*, is not admissible in evidence. The fact must appear by a certified copy of the execution and of the constable's return thereto.—*Id.*

7. *Levy—Officer—Sheriff's Sale and Deed.*—A sheriff who has levied an execution upon real estate merely by endorsing a levy upon his writ, and has subsequently turned over the writ with his other unexecuted process to his successor in office, cannot afterwards proceed to sell and convey the lands of the defendant, and his deed will convey no title—R. C. 1855, p. 749, secs. 59, 62.—Merchants' Bk. v. Harrison et al., 433.

8. *Sheriff's Deed—Evidence.*—The recitals in a sheriff's deed conveying lands of the judgment debtor, are evidence of the existence of the judgment without producing the record.—*Id.*

9. *Ejectment—Improvements—Injunction—Practice—Judgment.*—In an action for an injunction to restrain the plaintiff in ejectment from enforcing his judgment until compensation be made for improvements, the courts cannot enter judgment against the plaintiff in ejectment for the value of the improvements and enforce the same by execution.—Russell et als v. Defrance, 506.

10. *Ejectment—Common Source of Title—Evidence* —When both parties claim under the same third person, it is *prima facie* sufficient to show a derivative title from him without proving his title. — Merchants' Bank v. Harrison et al., 433.

11. *Justices' Courts—Transcript—Evidence.*—A copy from the docket of a justice of the peace, certifying that an execution issued to the constable of the township in which defendant resided, and setting out the return of the constable of *nulla bona*, is *prima facie* evidence to authorize the clerk of the Circuit Court to issue an execution upon the transcript of the justice's judgment filed in his office. Upon a motion to quash such execution, the defendant may show any defect or irregularity in the justice's process or constable's return.—Ruby v. Hann. & St. Jo. R.R. Co., 480.

12. *Removal — Notice.* — Harris v. Chouteau et als., 37 Mo. 165, affirmed. A party who changes his residence and removes from the county after the commencement of a suit against him, is not entitled to notice of the issuing of execution to the sheriff of the county in which judgment is recovered before lands can be sold—R. C. 1855, p. 746, sec. 16.—Buchanan v. Atchison, 503.

F

FEES.

Circuit Attorney—Officers.—The circuit attorney is not entitled to any fee in criminal cases upon indictments when he fails to obtain a conviction.—State ex rel. Gensel v. Auditor, 427.

FRAUDS, STATUTE OF.

See CONTRACTS, 2, 6, 8. EQUITY, 5, 6.

FRAUDULENT CONVEYANCES.

Evidence.—Testimony to prove the bad faith of the parties in a sale of goods, wholly disconnected with a subsequent sale of realty, is not admissible to prove bad faith in the sale of the realty.—Gutzweiler's adm'r v. Lackmann et als., 91.

I

INJUNCTION.

1. *Dissolution — Damages.*— The statute (R. C. 1855, p. 1249, § 13) limits the amount of damages at ten per cent. upon the amount enjoined to cases in which money has been actually stayed by the injunction; in other cases, the defendants may recover the damages actually sustained.—Hale et al. v. Meegan et al., 272.

2. *Practice — Parties — Ejectment.* — Tenants in common may join as parties plaintiff to enjoin the enforcement of a judgment in ejectment until compensation be made for improvements under the statute, although they were not all made defendants in the ejectment, the possession of one tenant in common being the possession of all.—Russell et als. v. Defrance, 506.

3. *Ejectment—Improvements—Practice—Judgment.*—In an action for an injunction to restrain the plaintiff in ejectment, from enforcing his judgment until compensation be made for improvements, the court cannot enter judgment against the plaintiff in ejectment for the value of the improvements and enforce the same by execution.—*Id.*

INTEREST.

1. *Usury — Action.* — A party who has voluntarily paid unlawful interest upon a usurious contract cannot, by suit, recover back the unlawful interest thus paid.—Ransom v. Hays, Garn., 445.

2. *Attachment—Garnishment—Damages.*—A mere liability of the garnishee to an action on the part of the defendant for unliquidated damages, as for negligence, fraud, wrongful conversion, or for the recovery of usurious interest paid him by the debtor, cannot be the foundation of a judgment against the garnishee.—Ransom v. Hays Garn., 445.

INSURANCE.

Life Policy—Homicide.—A life policy contained a condition, that "in case the insured should die in the known violation of any law of the State, or of the United States, or of any government where he might be, the policy should be void." The insured was killed in a personal rencontre with W. The court instructed the jury, that if the insured was killed in the lawful defence of his person when there was reasonable cause for him to apprehend a design on the part of W. to do him a great personal injury, and also to appre-

INSURANCE (*Continued*).

hend immediate danger of such design being accomplished, then the insured did not come to his death in the known violation of the laws of the land. *Held*, that, under the statute of this State, if the insured had killed W., it would have shown a case of justifiable homicide, and not a violation of the law within the meaning of the policy.—Harper's adm'r v. Phœnix Ins Co., 19 Mo. 506.—Overton v. St. Louis Mut. Life Ins. Co., 122.

J

JUDGMENTS.

1. *Conveyance—Recording—Evidence.*—A decree establishing the execution of a deed which had been lost, does not operate as a conveyance, but establishes the fact that a deed was executed; and is binding upon all parties and upon all privies in estate, blood or law, although not recorded.—McCamant v. Patterson et al., 100.
2. *Estoppel.*—The action of the court refusing to set aside an order previously made upon motion of a party alleging that he had not appeared to, nor had notice of the motion upon which the order was made, concludes the party.—Bennett's adm'r v. Russell's adm'x, 152.
3. *Administration.*—A leasehold for ten years is a chattel interest, and passes to the administrator and not to the heirs of the lessee.—Gutzweiler's adm'r v. Lackmann et al., 91.

JURISDICTION.

See COURTS, 1. ADMINISTRATION. EQUITY.

1. *Lands and Land Titles—Land Office—Courts.*—Where the officers of the Land Department of the United States act in violation of or without authority of law, their action is subject to the revision of the courts; but where they act in a judicial capacity, or exercise a discretionary authority, their acts cannot be reviewed.—Garton v. Cannada, 357.
2. *Judiciary—Mandamus—Executive.*—The Supreme Court has no jurisdiction to issue a writ of mandamus to the Governor of the State to compel him to issue a commission to an officer. The duty of the Governor to issue a commission is political and not merely ministerial.—State ex rel. Bartley v. Governor, 388.
3. *Justices' Courts.—Action for the Recovery of Specific Personal Property.*—A justice of the peace has no jurisdiction in an action for the recovery of specific personal property exceeding fifty dollars in value; and if it appear that the property is of a greater value, the action should be dismissed. In case of an appeal, the value of the property at the time of the trial before the justice is the test of jurisdiction.—Scott et al. v. Russell et al., 407.

JUSTICES' COURTS.

1. *Appeals—Transcripts.*—Upon an appeal from a justice of the peace, it is the duty of the justice to file with the clerk of the appellate court the transcript of his entries and the original papers filed in the cause. If the papers are lost after filing and the appellant desire to prosecute the appeal, he may have the lost record supplied; if he fail to do this, the appellee may have the judgment affirmed for want of prosecution of the appeal, but cannot have the appeal dismissed.—Fanning et al. v. Voelker, 120.

JUSTICES' COURTS (*Continued*).

2. *Executions—Hannibal Common Pleas.*—By the provisions of the act of March 3, 1851 (Sess. Acts 1850–51, p. 208, § 3), it was necessary, before an execution could issue from the office of the clerk of the Hannibal Court of Common Pleas upon the transcript of a justice's judgment, that a transcript of the judgment should also be filed in the office of the clerk of the Circuit Court of Marion county; and the filing of such transcript was a condition precedent to the judgment becoming a lien upon real estate, and authorizing an execution from said Common Pleas.—Carr v Youse, 346.

3. *Executions—Transcript of Judgment—Evidence.*—The certificate of a justice of the peace, that an execution has been issued upon a judgment rendered by him and has been returned *nulla bona*, is not admissible in evidence. The fact must appear by a certified copy of the execution and of the constable's return thereto.—*Id.*

4. *Transcript—Execution.*—A copy from the docket of a justice of the peace, certifying that an execution issued to the constable of the township in which defendant resided, and setting out the return of the constable of *nulla bona*, is *prima facie* evidence to authorize the clerk of the Circuit Court to issue an execution upon the transcript of the justice's judgment filed in his office. Upon a motion to quash such execution, the defendant may show any defect or irregularity in the justice's process or constable's return.—Ruby v. Hann. & St. Jo. R.R. Co., 480.

5. *Jurisdiction—Action for the Recovery of Specific Personal Property.*—A justice of the peace has no jurisdiction in an action for the recovery of specific personal property exceeding fifty dollars in value; and if it appear that the property is of a greater value, the action should be dismissed. In case of an appeal, the value of the property at the time of the trial before the justice is the test of jurisdiction.—Scott et al. v. Russell et al., 407.

6. *Appeals.*—Upon an appeal from a justice of the peace to the Circuit Court, the case must be tried anew upon the same cause of action presented before the justice. The plaintiff cannot in the Circuit Court amend his account so as to change his cause of action.—Clark v. Smith, 498.

L

LANDLORD AND TENANT.

1. *Surrender.*—What will amount to a surrender is a question which may be presumed from facts. An actual and continued change of possession by the mutual consent of the parties will be taken as a surrender by operation of law, whether the possession be delivered to the landlord himself or to another in his behalf. Where the tenant notified the landlord of his intention to surrender the premises and sent him the keys, and the landlord permitted another person to take and occupy the premises without any consent by the tenant, *held*, that the tenant was discharged.—Matthews' adm'r v. Tobener, 115.

2. *Ejectment—Administration.*—A leasehold for ten years is a chattel interest, and passes to the administrator and not to the heirs of the lessee.—Gutzweiler's adm'r v. Lackmann et al., 91.

3. *Mechanics' Liens—St. Louis County.*—The special act relating to St. Louis

LANDLORD AND TENANT (*Continued*).

county, Acts 1857–8, p. 668, gives a lien to mechanics and others upon leasehold property. If the improvements placed upon leasehold property are such as the tenant could remove at the end of the term, they are not improvements within the meaning of the act for which the mechanic has a lien.—Kœnig v. Mueller et als., 165.

4. *Mechanic's Lien.*—The lien under the Mechanics' Lien Act affects nothing more than the interest which the lessee has acquired in the premises, and if the account accrues before the owner of the fee regains possession, the estate of the lessee is effectually bound by it. The owner of the fee must pay the debt, and thus extinguish the lien, or accept the purchaser as his tenant for the remainder of the term.—*Id.*

5. *Lease—Improvements—Removal of Materials.*—Where a tenant holds over by consent, either express or implied, after the determination of a lease for years, it will be considered as evidence of a new contract of tenancy, and the tenant will be presumed to hold under and subject to the terms of the original lease. Under a lease for years, the tenant upon complying with his covenants had the right to remove the materials of the buildings he had erected upon the premises. When the lease expired he still continued to pay the rents and taxes from year to year. The property being condemned for a street—*Held*, that the value assessed upon the buildings belonged to the tenant, no forfeiture having taken place at the time of the condemnation.—Finney et als. v. City of St. Louis et al., 177.

6. *Rents — Lease — Agreement — Dissent.*—Where a tenant for a term of years or from year to year, holds over and retains possession of the premises after the end of his term and without any new agreement, he will be held to continue under the terms and conditions of the original lease; but where an agreement, express or implied, is made for an increased rent, the larger rent will be payable although the tenant's liability is continued on the terms of the previous lease. Where a tenant is notified by the landlord that if he retain the premises after the end of his term he must pay an increased rent, if the tenant do not express his dissent within a reasonable time he will be held as assenting to the proposed change. In such case it is the duty of the tenant to express his dissent, that the landlord may take the proper steps to recover his possession. By remaining in possession and continuing silent, his assent will be presumed.—Hunt v. Bailey, 257.

7. *Lease—Forfeiture—Municipal Corporation.*—The courts cannot relieve against a forfeiture of a lease declared by a municipal legislative body; but to give validity to such a forfeiture the action of the council must conform to all the requirements of the charter—Graham v. City of Carondelet, 33 Mo. 262, affirmed. Before the forfeiture is completed by the approval by the mayor of the resolution of the council, the lessee may tender the rent due and thus avert the penalty.—Carondelet v. Wolfert, 305.

8. *Rent — Contract.*—A tenant when notified that his rent will be increased at the commencement of a new term, and not expressing a refusal to remain as a tenant at such additional rent, will be held, if he continue the possession, as promising to pay the rent demanded.—Adriance v. Hafkemeyer, 134.

LANDS AND LAND TITLES.

1. *Confirmations — Abandonment.* — The act of Congress of 13th June, 1812, confirming the titles to lots, &c., in the villages named, operated to vest the legal title in the claimants who brought themselves within the provisions of the act by proving cultivation and possession; subject to be destroyed by proof that the party had abandoned the land with the intention that it should no longer be his. Abandonment is a question of fact to be decided by a jury under the directions of the court.—Fine et als. v. St. Louis Pub. Schools et als., 39.

2. *Common Field Lots.*—Common field lots are narrow lots adjoining to each other, having the same general range and a uniform depth, and used by the inhabitants of the town for cultivation.—*Id.*

3. *New Madrid Locations — Right of Location* —The act of Congress of February 13th, 1815, for the relief of the inhabitants of the county of New Madrid who suffered by earthquakes, conferred a right of location upon those only who were owners of the injured lands at the date of the act, or who subsequently became the legal representatives of such owners by descent, purchase, or operation of law. The right of location did not accrue to one who had been the owner if he had parted with his title prior to the passage of the act; and it was not necessary that the derivative title to the land giving the right of location should be proved by legal conveyances duly recorded. The former owners of the injured lands, their heirs, or their assignees, by conveyances subsequent to the act of Congress, had no concern with the evidence by which the fact of ownership as between the parties to the prior transfers of title of ownership was proved, further than that they were at liberty to question the competency and sufficiency of the evidence when produced, to prove the fact.—McCamant v. Patterson et al., 100.

4. *Railroad Corporations.*—Under the act of Congress of June 10, 1852, granting lands to the State of Missouri for the construction of the roads therein named, and the statute of the State of December 25, 1852, transferring such grants to the companies therein named, no title to the even numbered sections passed to the corporations until the plats of location of the road were filed in the office of the Secretary of State, and in the offices of the recorder of deeds of the counties in which the lands were situated.—Pacific R.R. v. Lindell's heirs, 329.

5. *Railroad Corporations—Estoppel.*—Under the act of Congress June 10, 1852, granting lands to the State of Missouri, and the act of the State of December 25, 1852, transferring such grant to the Pacific Railroad, the agent of the company, in estimating the quantity of lands within the exceptions of the granting act, returned sections 8 and 18, T. 45 N., R. 7 E., as included within the exceptions, and selected lands outside of the limits of six miles to make up the quantity of lands to which the company was entitled under the grants, lists of which were certified to the company. *Held*, that by this action the company was estopped form asserting that said sections were not included within the exceptions of the act, although subsequent corrections of the certified lists made at the General Land Office showed that the company had not received all the lands to which it was entitled.—*Id.*

LANDS AND LAND TITLES *(Continued)*.

6. *New Madrid Locations — Act of June* 10, 1852. — A certificate of location under the act of Congress of February 17, 1815, for the relief of sufferers by earthquakes in New Madrid, located in 1818, and survey made and returned to the Surveyor General in 1820, but not returned to the Recorder of land titles until 1859, constituted a valid location of the land covered by the survey, and brought the land within the exceptions of the act of Congress of June 10, 1852, granting lands to Missouri for the construction of the roads named in the act.—Pacific R.R. v. Lindell's heirs, 329.

7. *Public Lands—Graduation—Entries.*—The act of Congress, 10 U. S. Stat. 574, called the Graduation Act, conferred the right of entry under its provisions upon persons who were capable of acting and contracting for themselves, and not upon those who were subject to the dominion of another.—Garton v. Cannada et al., 357.

8. *Land Office—Jurisdiction—Courts.*—Where the officers of the Land Department of the United States act in violation of or without authority of law, their action is subject to the revision of the courts; but where they act in a judicial capacity, or exercise a discretionary authority, their acts cannot be reviewed.—Garton v. Cannada et al., 357.

9. *Jurisdiction — Public Lands.* — The courts of this State may allow compensation for improvements to a party who has made an entry with the Register and Receiver of the Land Office, paid his money and received a certificate, against a party who with knowledge of the facts has made a subsequent entry and received a patent. Such action does not interfere with the disposal of the public lands by the U. States.—Russell et als. v. DeFrance, 506.

10. *New Madrid Locations—Act of April* 26, 1822—*Return of Survey to Recorder.* —The act of Congress of April 26, 1822, in requiring that all warrants should be located within one year from the passage of the act, applied only to such acts as the owners of New Madrid claims could themselves do, and not to the action of the public officers of the Government. When the survey and plat of a New Madrid location were made in 1818, and filed in the office of the Surveyor General at that time, the failure of the Surveyor to return the plat of survey to the Recorder of land titles until 1841 did not make void the location. The return of the survey to the Recorder was the duty of the Surveyor General, and not of the claimant. (Easton v. Salisbury, 21 How. 426, commented on.)—Gibson v. Chouteau's heirs, 536.

11. *Surveys — Public Officers — Jurisdiction—Conflicting Titles.*—When the survey of location or claim is once made officially and approved, the officers of the Land Department have no authority to set aside or annul such surveys on the ground that the interferences with other surveys are not presented on the plat. It is the province of the courts to determine judicially between conflicting titles to the same land. Surveys are merely evidence of location and boundary, and decide nothing as to superiority of title. Where an individual in the prosecution of a right does everything the law requires him to do, the law will protect him against the neglect, misconduct or unauthorized acts of a public officer.—*Id.*

12. *Patent — New Madrid Location — Assignee.*— A patent may issue to the assignee of a New Madrid location and will pass the legal title, the presump-

LANDS AND LAND TITLES *(Continued)*.

tion being that, when the patent issues, all the acts necessary to its validity have been properly done; but the defendant in a suit may show that he was one of the legal representatives of the original locator, or that he has an equitable title to the land described in the patent.—*Id.*

13. *Deed—Estate — Granting Words — Covenants — Warranty — Quit-claim.* — The words "*bargain, sell, release, quit-claim and convey*" are words of release and quit-claim merely; they carry the grantor's interest and estate in the land, but do not purport to do anything more. The statutory covenants created by the words "grant, bargain and sell" do not operate as the ancient common-law warranty to transmit a subsequently acquired title. A deed purporting to convey a fee simple absolute, so as to pass a subsequently acquired title under the statute, must undertake to convey an indefeasible title; and must undertake to convey not the grantor's interest in the land, but the land itself, and in such a manner that the grantee is not to be disturbed by any one. A deed conveying the "*right, title and interest*" of the grantor can have no other or greater effect than a deed of release and quit-claim.—Gibson v. Chouteau's heirs, 536.

14. *New Madrid Location—Patent—Relation—Limitations.*—Where the equitable title has passed from the United States, the legal title evidenced by a patent will relate back to the emanation of the equitable title, so that the limitation created by an adverse possession under the statutes of the State will commence to run from the emanation of the equitable title. When the survey of a New Madrid location is returned to the Recorder of land titles, an exchange of lands is effected between the Government and the locator, and the equitable title passes from the United States, and from that date a party in possession of the located land may prescribe as against the New Madrid locator.—*Id.*

15. *Banks and Banking* — Under the "Act to regulate banking institutions. (Sess. Acts 1856-7, p. 21. § 26), the banks thereby incorporated might lawfully purchase real estate if the purchase was made in good faith for the purpose of securing a debt due to the bank.—Merchants' Bank v. Harrison et al., 433.

LIMITATIONS.

1. *Breach of Covenant—Action accrued.*—H. purchased K's interest in land, and made an agreement under seal with K. in which it was stipulated that H. was to proceed to have partition made of the land, and that after partition each party should select an appraiser to value the interest in the land sold by K. to H., and that if the appraisers thus selected could not agree they should select a third, whose decision should be final; and that H. should pay K. the value over $600, and K. should pay H. the appraised value under $600. *Held*, that as the agreement did not impose upon either party the initiative no cause of action arose until a demand and refusal to appoint an appraiser, and that the statute of limitations would begin to run only from the time of such demand and refusal; and that by the statute R. C. 1845 the action would be barred by the lapse of ten years from such breach of the covenant. —Brault et ux. v. Howard, 21.

LIMITATIONS *(Continued)*:

2. *Estate Outstanding—Adverse Possession—Prior Lease* —Where both parties claim under the same grantor, a prior lease by the grantor for a term of years prevents the running of the statute of limitations; the possession of the tenant is not adverse. B. in 1847 conveyed premises to W., a lease for twenty years (expiring in 1857) then outstanding, and the tenant in possession. In 1851 B. leased to M. an adjoining lot, under which lease M. entered upon part of the premises granted to W. and held possession. *Held*, that the possession of M. if he entered prior to the end of the term of twenty years, was not adverse to the landlord and his grantee W. until the term expired.—Kellogg v. Mullen, 174.

3. *Administration—Trust.*—To a suit by the distributee of an intestate against an administrator holding the fund in trust, the statute of limitations does not apply. No lapse of time is a bar to a direct trust, or a fraud as between trustee and beneficiary. Where there is no person to sue, no laches can be imputed. A devisee cannot show title to personal estate until the will has been admitted to probate, and no cause of action accrues until letters testamentary or of administration are granted.—Dillon's adm'r v. Bates, trustee, &c., 292.

4. *Adverse Possession.*—The possession of a party entering upon land under a verbal contract with the owner for its purchase, is not an adverse or hostile possession, and although continued for ten years does not bar the title.—Cole v. Roe, 411.

5. *Lands and Land Titles — Patent — Relation.*—Where the equitable title has passed from the United States, the legal title evidenced by a patent will relate back to the emanation of the equitable title, so that the limitation created by an adverse possession under the statutes of the State will commence to run from the emanation of the equitable title. When the survey of a New Madrid location is returned to the Recorder of land titles, an exchange of lands is effected between the Government and the locator, and the equitable title passes from the United States, and from that date a party in possession of the located land may prescribe as against the New Madrid locator.—Gibson v. Chouteau's heirs, 536.

M

MALICIOUS PROSECUTION.

1. *Action—Trespass—False Imprisonment—Malicious Arrest.*—An action for a malicious arrest is an action to recover damages for the malicious abuse of the civil process of arrest; a suit for malicious prosecution is an action for the malicious abuse of the criminal process; but a party who has been arrested by the police at the request of another without any complaint preferred, may maintain an action for false imprisonment, when no action could be sustained for a malicious arrest or malicious prosecution. To constitute false imprisonment it is not necessary that manual force should be actually employed; it is sufficient if the party against his will yield to force threatened.—Ahern v. Collins, 145.

2. *Action—Evidence.*—In an action for malicious prosecution, the jury are authorized to infer the existence of malice from the want of proof of probable cause for the prosecution.—Callahan v. Caffarata, 136.

MALICIOUS PROSECUTION *(Continued)*.

3. *Want of Probable Cause—Malice.*—To support an action for malicious prosecution, it must appear affirmatively that the defendant was instigated by malice, and that he had no probable cause for the prosecution. Malice may be inferred from the want of probable cause, but the want of probable cause cannot be inferred from proof of malice. That the accused was discharged by the examining magistrate, or that the indictment was ignored by the grand jury, is evidence to show the want of probable cause.—Casperson v. Sproule, 39.

MANDAMUS.

1. *Judiciary—Jurisdiction—Executive.*—The Supreme Court has no jurisdiction to issue a writ of mandamus to the Governor of the State to compel him to issue a commission to an officer. The duty of the Governor to issue a commission is political and not merely ministerial.—State ex rel. Bartley v. Governor, 388.

2. *Practice—Pleading.*—A petition for a writ of mandamus must state specifically all the facts which give the party the right to maintain an action or to demand the relief he seeks, and must also show that he has no other specific remedy.—State ex rel. Bartley v. Governor, 388.

3. *Mandamus.*—The courts will not undertake by writ of mandamus to enforce simple common-law rights between individuals, such as the payment of money, nor where there is another adequate legal remedy.—State ex rel. &c. v. Howard Co. Ct., 375.

MECHANICS' LIENS.

1. *St. Louis County—Landlord and Tenant.*—The special act relating to Saint Louis county, Acts 1857–8, p. 668, gives a lien to mechanics and others upon leasehold property. If the improvements placed upon leasehold property are such as the tenant could remove at the end of the term, they are not improvements within the meaning of the act for which the mechanic has a lien.—Kœnig v. Mueller et als., 165.

4. *Landlord and Tenant.*—The lien under the Mechanics' Lien Act affects nothing more than the interest which the lessee has acquired in the premises, and if the account accrues before the owner of the fee regains possession, the estate of the lessee is effectually bound by it. The owner of the fee must pay the debt, and thus extinguish the lien, or accept the purchaser as his tenant for the remainder of the term.—*Id.*

3. *Contractor—Priority.*—The contractor or mechanic cannot by his lien acquire any greater estate in the premises than the person who employed him possessed. If the owner of the premises has given a deed of trust for part of the purchase money, the mechanic's lien is an encumbrance subsequent to such deed, and a sale under the deed divests the lien.—Bridwell v. Clark et als., 170.

MORTGAGES.

1. *Trust—Power—Assigns.*—H. and wife, to secure a debt due T., executed a deed of trust to S. & W. and the survivor of them—*habendum* to the said S. & W. and the survivor of them, and the heirs and *assigns* of the survivor—in

MORTGAGES (*Continued*).

trust, on default of payment, that the said S. & W. or the survivor of them, or the executors, administrators or *assigns* of such survivor, or the sheriff of the county, might sell the property to pay the debt. S. died; W., the survivor, conveyed the property with the power to C., who made the sale under the deed of trust. *Held*, that the surviving trustee (W.) could not substitute another to the powers conferred upon him by the deed of trust; that being a mere instrument to execute the purpose of the grantor, he could not delegate his power to another without express authority conferred by the deed itself; and that the assignee by deed of the survivor was not an *assign* who could execute the power; and that the grantee of the survivor was not one of the *assigns* described in the deed.—Whittelsey v. Hughes et als., 13.

2. *Uses and Trusts — Equity.* — Trustees in deeds of trust with powers of sale to secure debts are considered as the agents of both parties, debtor and creditor, and they must act with the strictest impartiality and integrity; and when it is shown that they have abused their trust, or have combined with one party to the detriment of the other, or when it appears that a substantial injury has resulted from their acts in failing or neglecting to exercise a wise and sound discretion, equity will grant relief.—Goode v. Comfort et als., 313.

3. *Deeds of Trust—Trustees' Sale—Redemption.* — In a sale by trustees under a deed of trust with a power of sale, to secure a debt, the trustees put up property in the city of St. Louis as a whole, and sold the same to the *cestui que trust*, and it appearing that the property would have brought a much higher price had it been sold in lots in accordance with the subdivision of the owner previously made, the court set aside the sale by the trustees and permitted the owner to redeem.—*Id.*

4. *Assignments — Notes — Choses in Action.* — A note may be assigned by a separate and distinct paper; and where a party conveyed real estate by deed of mortgage, and also "all his notes, bonds, accounts and evidences of debt," the title to such *choses in action*, although not delivered, passed to the mortgagee as against an execution creditor.—McGee v. Riddlesbarger et als., 365.

O

OFFICERS.

See MANDAMUS, 1. FEES, 1. CONSTITUTION, 3. CONVEYANCES, 8. EXECUTIONS, 4, 7. REVENUE.

Conveyance—Acknowledgment.—A notary public, in his certificate of the acknowledgment of a deed conveying land in Livingston county, described himself as a notary public within and for the county of L., but appended to his signature—"Notary Public, Howard county." *Held*, that the deed was admissible in evidence.—Merchants' Bk. v. Harrison et al., 433.

P

PARTNERSHIP.

See CONFLICT OF LAWS, 1.

PRACTICE, CIVIL.

1. *Equity — Parties — Distributees — Trustee.*—In a suit in equity brought by one distributee of the estate of an intestate against the administrator to set aside a settlement on the ground of fraud, all the distributees must be made parties either as plaintiffs or defendants, to avoid multiplicity of suits and to enable the court to make a complete and binding decree. Although a trustee of an express trust may, by the statute, sue without joining the beneficiaries with him, *quære*, can he be sued alone?—Dillon's Adm'r v. Bates, Trustee, &c., 292.

2. *Improvements—Injunction—Judgment.*—In an action for an injunction to restrain the plaintiff in ejectment from enforcing his judgment until compensation be made for improvements, the court cannot enter judgment against the plaintiff in ejectment for the value of the improvements and enforce the same by execution.—Russell et als. v. Defrance, 506.

3. *Decree — Infant — Guardian.*—The decree of a court of chancery against an infant, based upon the appearance of the infant by his guardian, without any previous service of process upon the infant, is void, and the infant cannot be bound by such decree. The infant heir cannot appear and answer by his general guardian only.—Gibson v. Chouteau's heirs, 536.

PLEADINGS.

4. *Joinder of Actions—Pleading.*—A cause of action for damages for the detention of property cannot be united in the same petition with causes of action founded upon contracts.—Hoagland v. Hann. & St. Jo. R.R. Co., 451.

5. *Jotnder of Causes of Action — Pleading.* — Several causes of action founded upon distinct contracts cannot be united in the same count of the petition. —*Id.*

6. *Parties.* — The objection, that some of the plaintiffs are improperly made parties to the suit, if apparent upon the face of the petition, must be made by demurrer or the objection will be considered as waived.—Russell et als. v. Defrance, 506.

7. *Judgment — Relief.*—Where the facts are sufficiently stated in the petition, the plaintiff may have such judgment as the facts stated entitle him, although in the prayer of the petition he ask for a different relief; but if the facts be not stated, he cannot have the relief upon the facts proved at the trial.—Miltenberger v. Morrison et als., 71.

8. *Petition.*—A petition stating such facts as show a right of recovery in the plaintiff will be sufficient, although the facts are not so stated as to show a right of recovery in any of the common-law forms of action.—Ahern v. Collins, 145.

9. *Written Instrument.* — In declaring upon a written instrument, it is sufficient to plead it according to its legal meaning and effect.—Jones v. Louderman, 287.

10. *Trial — Variance.*—A party cannot declare upon one cause of action and recover upon an entirely different and distinct cause of action. If there be a variance between the evidence and the pleading, the pleading should be amended so as to conform to the evidence, or the objection will be fatal.—*Id.*

PRACTICE, CIVIL—PLEADINGS (*Continued*).

11. *Arrest of Judgment.*—Although a pleading be defective, yet if it appear after verdict that the verdict could not have been rendered without proof of the matters omitted in the pleading, the defect will be cured and the judgment will not be arrested.—*Id.*

12. *Answer.*—An answer, to a petition alleging that defendant owes plaintiff for goods sold and delivered, denying the indebtedness, impliedly admits the sale and delivery.—Lee v. Casey, 383.

13. *Demand.*—To avail himself of the want of demand prior to action brought, the defendant must plead the failure to make demand—R. C. 1855, p. 448, § 34.—*Id.*

14. *Answer.*—Pleading conditionally, or in the alternative, is not allowable, and should be avoided. An answer setting up new matter, by way of defence, should confess and avoid the plaintiff's cause of action.—Bauer v. Wagner, 385.

15. *Mandamus.*—A petition for a writ of mandamus must state specifically all the facts which give the party the right to maintain an action or to demand the relief he seeks, and must also show that he has no other specific remedy.—State ex rel. Bartley v. Governor, 383.

16. *Answer.*—Such parts of an answer as present no defence to the matter charged in the petition may be stricken out upon motion.—Houston v. Lane, 495.

TRIALS.

17. *Continuance.*—Discretion of court in refusing a continuance, properly exercised.—State to use, &c., v. Shreve et als., 90.

18. *Instructions—Error.*—If there be any evidence to sustain the issues upon the part of the plaintiff, it is error in the court to instruct the jury that the plaintiff is not entitled to recover. The sufficiency of the evidence is for the determination of the jury.—McKown et al. v. Craig et al., 156.

19. *Exceptions—Evidence.*—The reason for objections to the admission of evidence must be stated in the bill of exceptions.—Woodburn et al. v. Cogdal et al., 222.

20. *Amendments.*—Where the evidence is closed and the cause submitted to the court, the defendant should not be allowed to amend his answer by introducing a new defence without giving the plaintiff an opportunity to meet such defence.—Garton v. Cannada et al., 357.

21. *Supplying Lost Records.*—*Default.*—Where the petition and writ are destroyed or lost after service, the plaintiff cannot file a new petition and take judgment by default without first giving notice to the defendant, and taking the proper steps to supply the lost record.—Brown v. King, 380.

22. *Default—Jury.*—Upon the assessment of damages upon an interlocutory judgment, the defendant has the right to demand that the damages be assessed by a jury.—*Id.*

23. *Instructions—Bill of Exceptions.*—To present matter of error in the giving or refusing of instructions, the evidence upon which they are based must be presented in the bill of exceptions.—Broadwell v. Bouton, 401.

PRACTICE, CIVIL—TRIALS (*Continued*).

24. *Continuance — Answer.* — After a case has been continued by the court, upon an answer to the merits filed by leave, it is improper to set aside the order of continuance, strike out the answer, and enter a default and judgment.—Taff v. Westerman, 413.

25. *Instructions—Bill of Exceptions.*—Unless the evidence be preserved in the bill of exceptions, the Supreme Court cannot pass upon errors in giving and refusing instructions. (Broadwell v. Bouton, *ante* p. 401.)—City of Kansas v. Kelly et ux., 415.

26. *Carrier—Damages—Negligence—Instructions.*—In an action against a carrier for injuries to a passenger caused by the negligence of the carrier, the court should not give instructions upon the subject of plaintiff's contributory negligence unless warranted by the evidence. Where the evidence showed that the passenger was injured while sitting in his seat in a railroad car and resting his head on his arm, which rested on the window-sill of the car, by the car coming in contact with the corner of a wrecked car which had not been sufficiently removed from the track; *held*, that there was no proper case made by the evidence for instructions upon the subject of contributory negligence.—Winters v. Hann. & St. Jo. R.R. Co., 468.

27. *Instructions—Exceptions.*—To enable the Supreme Court to decide upon the propriety of instructions given and refused, the evidence must be preserved in the bill of exceptions. Exceptions to instructions must be taken at the trial, and not upon a motion for a new trial.—Houston v. Lane, 495.

28. *Amendment—Return of Writs.*—The courts of this State will permit amendments to be made to the return of a writ to correspond with the facts of the case, and if the amendment be made at a term subsequent to the return term it will relate back to the proper return day.—Webster et als. v. Blount et als., 500.

NEW TRIALS, &C.

29. *Newly discovered Evidence.*—A motion for a new trial upon the ground of newly discovered evidence must show that the party has used due diligence to procure the evidence desired, and that it is not merely cumulative.—Callahan v. Caffarata, 136.

30. *Error—Motion for New Trial—Supreme Court.*—By the Practice Act of 1855, an opportunity must be given to the inferior court to correct errors by a motion for new trial or in arrest of judgment, before the case can be taken to the Supreme Court by appeal or writ of error.—Banks v. Lades, 406.

31. *Exceptions—Motion for New Trial.*—To preserve matters of exception, a motion for new trial must be made in the inferior court. — See *ante* Banks v. Lades, p. 405.—Bishop v. Ransom, 416.

32. *Error—Motion for New Trial.*—When a motion to set aside an execution is overruled, the party must make his motion for a new trial, and preserve the same in his bill of exceptions, before suing out his writ of error or taking his appeal. — *Ante*, Banks v. Lades, p. 406, and Bishop v. Ransom, p. 416.—Bishop v. Ransom, 417.

PRACTICE, CIVIL *(Continued)*.

SUPREME COURT.

33. *Appeal.* — Judgment affirmed for failure to file transcript of record of appeal.—Field et als. v. Farish, adm'r, 91.

34. *Appeal.* — Judgment affirmed for want of prosecution of appeal and failing to file transcript of record.—Ryan et al. v. Pratt et al., 291.

35. *Appeal.*—Judgment affirmed for failure to file transcript and prosecute appeal.—Bragg et al. v. Latourette, 355.

36. *Appeal.* — Judgment affirmed for failure to file transcript of record and prosecute appeal.—Wright et al. v. Whittenhal et al., 355.

37. *Appeal.* — Appeal dismissed for failure to assign errors. — Berg v. Bishop, 356.

38. *Error.*—Where no motion for new trial or in arrest of judgment is filed, upon an appeal or writ of error the Supreme Court can only notice such errors as are apparent upon the face of the record.—Hoppe v. Stone, 378.

39. *Appeal.* — Judgment affirmed, on motion of respondent for failure to file transcript and prosecute appeal. — Pumphrey v. Clark et al., 417.

40. *Error.* — The parties cannot by agreement submit a case to the Supreme Court upon the merits without filing an assignment of errors or briefs.—Snyder et ux. v. Hopkins, 418.

41. *Scire Facias.*—Judgment of Supreme Court revived upon *scire facias.*—Baker et als. v. Pate's Adm'r et al., 419.

42. *Appeal.* — Appeal dismissed for failing to assign errors and prosecute appeal, neither party appearing.—Shaw v. Potter, 419.

43. *Final Judgment.* — The transcript of the record, upon writ of error or appeal, must show that a final judgment has been entered by the inferior court.—State to use, &c. v. Hawkins' adm'r et als., 432.

44. *Briefs.* — In the Supreme Court, the party complaining of the errors committed by the court below must assign errors and file a brief presenting the errors upon which he relies to reverse the judgment. The parties cannot request the court to decide the case upon the merits unless the provisions of the statute and rules of court are complied with. — City of Parkville v. Clough, 520.

45. *Parties.*—The Supreme Court will not consider a case until the proper parties are brought into court.—Paxton, adm'r, v. Humber et al., 521.

PRACTICE, CRIMINAL.

1. *Indictment — Counts — Verdict.* — Where the defendant is convicted of a lesser degree of the offence charged in a count which embraces different degrees of the same offence, the verdict must specify such lesser degree; but the verdict need not specify under which count of the indictment the defendant is found guilty where there is no misjoinder of counts, and there is one good count upon which judgment may be rendered.—State v. McCue et al., 112.

2. *Gaming.* — Betting money or property upon the game called "pool,"

PRACTICE, CRIMINAL *(Continued)*.

is within the prohibition of the statute against gaming. — State v. Jackson, 420.

3. *Trial — Evidence — Confession.* — When an individual is put upon his trial for a criminal offence, the particular act which constitutes the crime must be proved. The confessions of a party not made in open court, nor before a magistrate on examination, and uncorroborated by circumstances or other proof that a crime has been committed, will not warrant a conviction.—State v. Scott, 424.

4. *Indictment—Arrest of Judgment.*—Where there are several counts in an indictment and a general verdict of guilty is returned, if any one of the counts be good the judgment cannot be arrested.—*Id.*

5. *Evidence — Jury — Misconduct.* — One of the jurors cannot be a witness to prove misconduct of the jury in making their verdict. — State v. Coupenhaver, 430.

6. *Filing Indictment.*—The omission of the clerk to enter upon the indictment the date of its filing is no ground for arresting the judgment.—*Id.*

7. *Indictment — Dram-shops.* — In an indictment for selling spirituous and alcoholic liquors without taking the oath and giving bond as required by the statute (Sess. Acts 1860-1, p. 93), it is not necessary that the indictment should state to whom the liquor was sold, the price, or the particular kind of liquor sold.—State v. Rogers, 431.

8. *Appearance—Process.*—The appearance of a party by counsel to a writ of *scire facias* upon a recognizance, will authorize a judgment against him although the process was not served.—State v. Woolery et als., 525.

9. *Recognizance—Record.*—Where the defendant enters into a recognizance before a justice of the County Court, to appear and answer to an indictment, after a change of venue had been granted, until the contrary be shown it will be presumed that all the steps necessary to give the justice jurisdiction had been properly taken—R. C. 1855, p. 849, § 21.—*Id.*

10. *Recognizance—Scire Facias.*—The return of "not found within the county" upon two successive writs of *scire facias*, upon a recognizance of bail in a criminal case, is equivalent to a service of the writ, and execution may be awarded against the principal upon his failure to appear and plead.—State v. Culp, 530.

11. *Indictment.* — An indictment will not be held defective or insufficient if enough remain to constitute a good charge of the offence after striking out the objectionable parts. An indictment charging that the defendants did assault one J. W. Jones, and him, the said John W. Jones, did put in fear, &c., sufficiently identifies the person against whom the offence was committed.—State v. Wall et al., 532.

12. *Evidence — Instructions.* — Where the evidence offered is not sufficient to sustain the indictment, it is the duty of the court so to instruct the jury.—State v. Brosius et al., 534.

13. *Evidence.*—Under an indictment for selling liquors without having a dram-shop licence, it must be proved that the liquors were sold in less quantities than one gallon and for the purpose of being drunk on the premises.—*Id.*

R

REVENUE.

1. *Union Military Bonds — Auditor.* — By the statute (Acts 1865-6, p. 96) the Auditor has no duty to perform in redeeming Union Military bonds. The interest is to be calculated and the bonds redeemed by the Treasurer. — State ex rel. Greene Co. v. Auditor, 429.

2. *Municipal Corporations — Charter.* — The City of St. Joseph by its charter (Sess. Acts 1863-4, p. 430) had authority to levy and collect taxes for municipal purposes upon all property, real and personal, within the city limits. Steamboats, whose home port and *situs* was that city where the nominal owners resided, are subject to taxation.—Hoagland v. Hann. & St. Jo. R.R. Co., 451.

3. *Ownership.*—For purposes of taxation, possession is *prima facie* evidence of ownership.—*Id.*

4. *Municipal Corporations—Railroad Corporations—Charter.*—The City of St. Joseph, by its charter (Sess. Acts, 1863-4, p. 431), had authority to levy and collect a tax upon the real property of the Hannibal and St. Joseph Railroad Company situate within the chartered limits of said city. The exemption from State and county taxation upon the stock of said company by its charter did not prevent the Legislature from repealing the exemption, or subjecting the corporation to further taxation. The subjecting the property of said company to taxation for municipal purposes was not a double taxation.—City of St. Joseph v. Hann. & St. Jo. R.R. Co., 476.

S

SALES.

See CONTRACTS.

SECURITIES.

—*Discharge—Extension of Time—Usury.*—The security claiming that he has been discharged by the extension of the time of payment by the creditor to the principal debtor, must show that the time of payment was extended by virtue of a contract valid in law. A contract to extend the time of payment in consideration of the payment of usurious interest is not a contract which the law will enforce.—Wiley v. Hight, 130.

SLANDER.

See ACTION. PLEADING.

T

TRESPASS.

See ACTION. MALICIOUS PROSECUTION.

U

USES AND TRUSTS.

See MORTGAGES, 1, 2, 3. ADMINISTRATION, 1, 2. EQUITY.

V

VOLUNTEERS.

Counties — Contract — Bounties. — Under the statute (Sess. Acts 1863, p. 89,) counties were authorized to pay bounties to volunteers enlisting in the

VOLUNTEERS *(Continued)*.

military service, and where, in pursuance of the act, a county offered bounties to parties volunteering to fill the quota, a contract was made between the county and such volunteers, which could be enforced by action.—State ex rel. Bohannon v. Howard Co. Ct., 375.

W

WITNESSES.

1. *Party in Interest.*—To exclude a witness on the ground that he is a party in interest, it must appear that he has such an interest as the law will recognize and protect.—Miltenberger v. Morrison et als., 71.

2. *Evidence—Carrier—Parties.*—In an action by a passenger against a carrier for the loss of a trunk and its contents, where proof of the delivery of the trunk to the carrier is made by independent evidence, the plaintiff is a competent witness to prove the contents of the trunk. The statute, R. C. 1855, p. 1576, was not intended to restrict the competency of witnesses.—Williams v. Frost et al., 516.

3. *Corporations, Railroad—Evidence.*—By the law of this State, a passenger upon a railroad whose baggage has been lost, may be a witness to prove the contents and value of the baggage lost—R. C. 1855, p. 435, sec. 45.—Nolan v. Ohio & Miss. R.R. Co., 114.

4. *Witness—Party—Trustee.*—A trustee having no substantial interest in the matter in controversy is a competent witness for his co-defendant.—Hale et al. v. Meegan et al., 272.